No. 82-856

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In the Supreme Court of the United States

OCTOBER TERM, 1982

**UNITED STATES OF AMERICA, ex rel.
GERALD SCARPELLI,**

Petitioner,

vs.

ROBERT A. FISCELLA
~~RICHARD GEORGE,~~

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit runs afoul of the per se harmful error rule in *Chipman* v. *Mercer*, 628 F.2d 528 (9 Cir., 1980), creating an intercircuit conflict.

2. Whether the decision of the United States Court of Appeals for the Seventh Circuit improperly construes this Court's decision in *Sumner* v. *Mata*, 449 U.S. 539 (1981), creating a conflict between the Seventh Circuit and this Court.

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit, which concerns the issue of the trial court's curtailment of legitimate cross-examination without redress, is an issue of general significance and importance.

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GERALD SCARPELLI,**

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner, Gerald Scarpelli, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Seventh Circuit appears in Appendix A attached hereto. The order of the United States Court of Appeals denying a Petition for Rehearing *en banc* appears in Appendix B, attached hereto. The Memorandum

Opinion and Order of the District Court for the Northern District of Illinois appears in Appendix C, attached hereto. The Memorandum Opinion and Order of the District Court for the Northern District of Illinois denying Respondent's motion for reconsideration appears in Appendix D, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 26, 1982. Petitioner filed a Petition for Rehearing with *en banc* suggestion, which was denied in an order entered on September 20, 1982. This Petition is filed within 60 days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution are herein involved. The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 8, 1977, Petitioner was arrested for auto theft and possession of burglary tools. Trial was held in July 1979 before a jury. The State's chief witness was Clyde Culen, a police officer who allegedly witnessed Petitioner commit the crimes for which he was arrested. On cross-examination, the trial court sustained objections to questions relating to Culen's credibility, his trial preparation, and his identification of Petitioner. Specifically, Petitioner was precluded from testing Culen's credibility with respect to the source of his purported knowledge, his powers of discernment, memory and description.

Petitioner's testimony at trial disputed Culen's observations. Petitioner's testimony was bolstered by the testimony of two disinterested eyewitnesses, William Congleton and Linda McCormick. Congleton and McCormick had no prior connection with Petitioner. Both eyewitnesses testified that they saw a person, other than Petitioner and Culen, exit from the car and run in the opposite direction.

The jury subsequently returned guilty verdicts on both counts. On appeal, the Appellate Court of Illinois upheld the convictions. The Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal, and this Court denied Petitioner's Petition for Writ of Certiorari. 450 U.S. 915 (1981).

Petitioner filed the Petition for Writ of Habeas Corpus before the United States District Court for the Northern District of Illinois. On September 30, 1981 the District

Court granted the Writ of Habeas Corpus. After Respondent requested reconsideration, the District Court entered a second Memorandum Opinion and Order on October 30, 1981, reaffirming its earlier decision granting issuance of the Writ. Respondent appealed and on August 26, 1982 the United States Court of Appeals for the Seventh Circuit reversed the District Court's order granting the Writ. Petitioner filed a Petition for Rehearing with *en banc* suggestion, which was denied on September 20, 1982.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit runs afoul of the per se harmful error rule in *Chipman* v. *Mercer,* 628 F.2d 528 (9 Cir., 1980), creating an intercircuit conflict. The decision of the Court of Appeals for the Seventh Circuit improperly construes this Court's decision in *Sumner* v. *Mata,* 449 U.S. 539 (1981), creating a conflict between the Seventh Circuit and this Court. The decision of the Court of Appeals, which concerns the issue of the trial court's curtailment of legitimate cross-examination without redress, is an issue of general significance and importance.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense."

The right of confrontation, which includes the right to cross-examination, as a fundamental right applies to the states through the Fourteenth Amendment. *Pointer* v. *Texas,* 380 U.S. 400, 403-404, 13 L.Ed.2d 923, 926-927, 85 S.Ct. 1065 (1965).

In *Smith* v. *Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968), the defendant was not allowed to cross-examine the principal witness against him in regard to the witness' name and address. Justice Stewart, for the majority, cited with approval the principle enunciated in *Brookhart* v. *Janis,* 384 U.S. 1, 3, 16 L.Ed.2d 314, 316, 86 S.Ct. 1245, that a denial of cross-examination, without

waiver, would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure the error. *Smith* v. *Illinois*, 390 U.S. at 131, 19 L.Ed.2d at 959.

In *Davis* v. *Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1104 (1974), the defendant was not allowed to cross-examine a key prosecution witness in regard to his juvenile probationary status. The defense sought to pursue that line of questioning to explore an area of potential bias. Justice Burger, in the majority opinion, emphasized the importance of cross-examination as the principal means by which the believability of a witness and the truth of the witness' testimony are tested. *Id.* at 316, 39 L.Ed.2d at 353. In *Davis*, the defendant did not seek to test the witness' perception and memory. The defendant sought to question the witness to ascertain possible bias for purposes of impeachment. Justice Burger stated:

> "We cannot speculate as to whether the jury, as sole judge of credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that juors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's acts'." (citation omitted). *Id.* at 317, 39 L.Ed.2d at 354.

Citing *Brookhart* v. *Janis*, *supra*, and *Smith* v. *Illinois*, *supra*, the circumscription of cross-examination was found to be a constitutional error of the first magnitude, which could not be cured by any showing of want of prejudice. *Davis* v. *Alaska*, 415 U.S. at 318, 39 L.Ed.2d at 355.

In *Chipman* v. *Mercer,* 628 F.2d 528 (9 Cir., 1980), the trial court limited the defendant's cross-examination for potential bias or prejudice of the sole eyewitness. The Court in *Chipman* held that the denial of cross-examination for bias or prejudice violated the confrontation clause and that the question of whether the error is harmless in a particular case is not considered. *Id.* at 533. The Court stated that a trial court normally has broad discretion concerning the scope of cross-examination. However, the trial court's broad discretion is circumscribed unless the threshold level of cross-examination constitutionally required is satisfied. *Id.* at 530. The finding of the Court in *Chipman* of per se harm is limited to when a court finds that the denial of cross-examination rises to the level of a violation of the constitutionally guaranteed right of confrontation. *Id.* at 533. As the Court stated:

> "The seeming harshness of that rule (the per se harm rule) is diminished, however, because a confrontation clause violation generally does not occur unless the denial of cross-examination is one of considerable relevance. The degree of relevance, in turn, bears a close relation to whether denial of confrontation was prejudicial." *Id.*

In the case at bar, the District Court concurred with the Appellate Court of Illinois in finding that the trial court erred by unduly restricting Petitioner's right of cross-examination. Memorandum Opinion and Order dated September 30, 1981, page 2-3; and *People* v. *Scarpelli,* 82 Ill. App.3d 689, 402 N.E.2d 915, 922 (1980). The District Court, citing this Court's analysis in *Brookhart* v. *Janis, supra,* and *Davis* v. *Alaska, supra,* held that the confrontation clause errors which occurred in the case present per se grounds for reversal. Memorandum Opinion and Order dated September 30, 1981, pages 3-4.

The District Court amplified its earlier ruling in a Memorandum Opinion and Order dated October 30, 1981. The Court stated:

> "In sum, the per se rule upon which I rely is narrow. It applies only if the defendant can establish two predicate factors, namely, (1) that the witness he attempted to cross-examine provided testimony absolutely 'crucial' to his conviction, and (2) that the restriction imposed by the trial judge rendered 'ineffective' whatever cross-examination was allowed. Thus the per se rule will not apply if the witness' testimony was so unnecessary or cumulative that a conviction would have been warranted even if the defendant had succeeded in completely destroying the witness' credibility. Nor will it apply if the trial judge's rulings merely prevented the defendant from asking questions which were neither repetitious or of marginal relevance." Memorandum Order and Opinion dated October 30, 1981, page 8.

The District Court found that both factors were present and that Petitioner was prevented from effectively challenging his primary accuser. The Court of Appeals for the Seventh Circuit reversed the District Court's opinion in a decision dated August 26, 1982. The Court found that this Court's opinions in *Davis* v. *Alaska, supra,* and *Smith* v. *Illinois, supra,* do not explicitly state that abrogation of a defendant's Sixth Amendment rights to confront and cross-examine an accuser constitutes *per se* harm. Therefore, the Court concluded that *Davis* v. *Alaska* and *Smith* v. *Illinois* do not stand for the proposition that *per se* harm results from the denial of the constitutionally guaranteed right to confrontation. Slip Opinion, page 3-4. Further, the Court disposed of the Ninth Circuit's decision in *Chipman* v. *Mercer, supra,* by declaring that the *Chipman* decision did not, in fact, articulate a *per se* harm-

ful rule. Slip Opinion, page 4. For support, the Court relied on the final sentence of the *Chipman* decision which states:

> "We hold that the denial of cross-examination for bias or prejudice in this case violated the confrontation clause." *Chipman* v. *Mercer*, 628 F.2d at 533; Slip Opinion, page 4.

Contrary to the Court's interpretation, the use of the phrase "in this case" in the *Chipman* decision reflects that "confrontation questions must be resolved on a case by case basis based on examination of all the circumstances and evidence." *Chipman* v. *Mercer*, 628 F.2d at 530. In *United States* v. *Uramoto*, 638 F.2d 84, 87 (9 Cir., 1980), the Court reaffirmed the *per se* harmful standard applicable when a trial court so restricts cross-examination that a defendant's Sixth Amendment right to confrontation is abrogated.

Petitioner respectfully suggests that the opinion of the Court of Appeals for the Seventh Circuit, which repudiates the *per se* harm rule enunciated in the Ninth Circuit's decision in *Chipman* v. *Mercer, supra*, is inconsistent with this Court's decisions in *Brookhart* v. *Janis, supra, Smith* v. *Illinois, supra*, and *Davis* v. *Alaska, supra*. The *per se* harm rule only applies in a very narrow category of cases in which a violation of constitutional magnitude has been found. The decision of the Court of Appeals in this case creates intercircuit conflict notwithstanding the Seventh Circuit's effort to interpret *Chipman* v. *Mercer, supra*, to in fact require a showing that the restrictions in cross-examination were not harmless. The Court of Appeals sophistry cannot withstand scrutiny.

The decision of the Court of Appeals also misconstrues this Court's decision in *Sumner* v. *Mata*, 449 U.S. 539

(1981). The decision in *Sumner* v. *Mata* specifically held that state factual findings are entitled to a "presumption of correctness" in evaluating constitutional issues properly raised under 28 U.S.C. 2254. These findings can be overturned, if at all, only when they are not fairly supported by the record. *Id.* at 550.

In this case, the Appellate Court of Illinois specifically found, in several instances, that Petitioner was denied his right of cross-examination. The District Court, by its decision, accorded these factual findings their due presumption of correctness. Indeed, the record is replete with some 63 instances of improper and undue restrictions by the trial court on Petitioner's right to cross-examine and confront. The Court of Appeals, nonetheless, conducted a *de novo* review.

In order to conduct a *de novo* review, the Court of Appeals construed this Court's holding in *Sumner* v. *Mata, supra,* very narrowly. The Court stated:

> "The Court's finding that Scarpelli's Sixth Amendment right was violated is a mixed question of law and fact, and, consequently, Mata does not preclude us from determining *de novo* whether Scarpelli was denied his constitutional rights." Slip Opinion, page 6.

The Court of Appeals' narrow interpretation of *Sumner* v. *Mata* establishes a dangerous precedent. A court may always find that the issue presented contains a mixed question of fact and law, therefore allowing *de novo* review. The Court of Appeals' articulated exception to *Sumner* v. *Mata,* in effect, results in an exception that swallows the rule. Petitioner, therefore, respectfully suggests that the Court of Appeals' interpretation of *Sumner* v. *Mata* creates such a broad exception that a conflict exists between the Seventh Circuit and this Court.

The decision of the U.S. Court of Appeals for the Seventh Circuit raises an issue of general significance and importance. The decision, which grants trial courts a free hand to curtail legitimate cross-examination without redress, establishes a dangerous precedent.

The Court of Appeals' decision states that it is "mindful that cross-examination is the cornerstone of the criminal trial process, . . . and that the defendant must be given wide latitude to explore a witness' story, to test the witness' perceptions and memory and to impeach his credibility." Slip Opinion at page 4. Yet, the Court refused to recognize the per se harm rule that results from the abrogation of this fundamental right. The Court of Appeals' refusal to recognize the *per se* harmful rule resulted in the Court's sanctioning of the trial court's rulings restricting Petitioner's right of cross-examination. Petitioner was precluded by the trial court's rulings from examining Culen in each of the following areas: (1) whether Culen had previously testified in the cause; (2) Culen's experience as a testifying witness; (3) whether Culen had read police reports about the incident prior to testifying; (4) how many times Culen spoke to the State's Attorney prior to his testimony in court; (5) Culen's employment between the date of the alleged offense and the trial; (6) whether Culen had worked other than as a police officer on the date of the alleged offense; (7) whether Culen normally had a routine patrol in a marked squad car; (8) whether Culen's superiors had assigned him to the stake-out; (9) whether Culen called in license numbers to be checked other than the car in question; (10) whether Culen's experience of eight months as a police officer involved only patrol, or training as well; (11) whether Culen's past experience on stake-outs was successful; (12) the physical characteris-

tics of the parking lot; (13) whether Culen had previously testified prior to the trial contrary to his trial testimony; (14) the path taken by the vehicle; (15) what certain pictures and diagrams, state exhibits, showed; (16) what the people in the parking lot were doing at the time in question; (17) the color of the car in question; (18) the physical characteristics of the defendant; (19) the physical description and characteristics of the perpetrators of the offense; (20) whether Culen had his gun out when he approached the man in the parking lot; (21) whether Culen's police report differed from his trial testimony; and (22) whether the offender wore gloves.

In addition, the trial record is replete with prejudicial comments made by the trial court as he erroneously sustained objection after objection; "are you trying to impeach the witness. I don't understand what it is you are trying to do at this point." "The issue here is whether or not the defendant committed the offense he is charged with. This officer is not on trial." "You (defense counsel) can certainly argue that if you think that's different. You can argue that to the jury . . . till hell freezes over as far as I'm concerned, but you're not going to go any farther with this examination." "It's (the height of the defendant) not an issue in this case." "If you ask another question, I'm going to hold you in contempt of court, where I have sustained an objection." "It's an attempt by counsel to impeach on collateral matters and that's improper." "The absence of whether the officer put that in the police report has no bearing whatsoever on his testimony."

Petitioner was thus precluded from testing the credibility of Culen with respect to the source of his purported knowledge, his powers of discernment, memory and de-

scription. The trial court refused to allow defense counsel to question Culen with regard to contrary statements or actions given or done at another time. The Court precluded defense counsel from exploring Culen's bias towards Petitioner, his experience, his ability to observe, his utilization of police reports or conversations with the prosecutor prior to testifying in order to refresh his memory. Defense counsel was presented from questioning Culen about a police diagram Culen drew of the scene.

A conflict existed in the evidence as to whether only one person exited from the subject vehicle or two persons exited from the vehicle. Due to the conflict, it was vital that defense counsel be permitted to cross-examine Culen with precision as to Culen's recollection with regard to the height and size of the individual identified by Culen. Nonetheless, the trial court precluded such examination, precluded cross-examination with respect to Culen's previous testimony on the subject, and even threatened defense counsel with contempt if he persisted in the vital and legitimate inquiry. Under the circumstances, the Appellate Court of Illinois, the District Court, and the Court of Appeals found it was error of constitutional magnitude for the trial court to fail to permit Petitioner to cross-examine Culen concerning his identification testimony. Nonetheless, the Court of Appeals' decision places Petitioner in a form of "Catch 22." While the Court of Appeals recognizes that Petitioner was denied his constitutional right to cross-examination, it nonetheless finds sufficient other evidence to support a conviction. However, if Petitioner were given the opportunity to cross-examine Culen there is a substantial likelihood that the record would not reveal sufficient evidence to support his conviction. The State's case stands or falls on the testimony

of Culen alone. In view of the innocent explanation provided by Petitioner and other defense witnesses, unrestricted cross-examination would have influenced the jury's determination.

The error in not permitting cross-examination of the crucial State's witness in traditional legitimate and specifically crucial areas could not be said to not constitute per se harm. A finding of per se harm would not impinge on the trial court's broad discretion to expedite proceedings and prevent repetitions and irrelevant testimony. The application of the per se harm rule enunciated in *Chipman* v. *Mercer, supra,* which was misinterpreted in the Court of Appeals decision, has a very narrow application. In any event, the Court of Appeals incorrectly placed emphasis on the trial court's discretion over constitutionally guaranteed rights. The trial court's desire to control proceedings must give way to the constitutionally guaranteed right of the defendant to confront his accuser through adequate cross-examination.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2806

UNITED STATES OF AMERICA ex rel. GERALD SCARPELLI,
Petitioner-Appellee,

v.

RICHARD GEORGE,
Respondent-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 864—Susan Getzendanner, *Judge.*

Argued May 28, 1982—Decided August 26, 1982

Before BAUER, WOOD, and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* This appeal raises the issue of whether the state trial court's failure to permit a defendant to cross-examine a crucial witness concerning his trustworthiness and reliability is, as a matter of law, harmful error. The district court held that it was. We reverse.

Petitioner-appellee Gerald Scarpelli was convicted of auto theft and possession of burglary tools in the Circuit Court of DuPage County, Illinois. He appealed, claiming, among other errors, that he was denied a fair trial

because the trial judge had unduly restricted his cross-examination of the state's chief witness, Officer Culen. The trial court sustained objections to questions relating to Culen's credibility, his trial preparation, and his identification of Scarpelli. The state appellate court found no error with respect to the restrictions concerning Culen's credibility or trial preparation and held that the restriction relating to Culen's identification of Scarpelli, while improper, was harmless error. The Illinois Supreme Court and the United States Supreme Court, in turn, denied certiorari.

Scarpelli then petitioned the district court for a writ of habeas corpus. The district court granted his petition. It agreed with the state appellate court that restricting Scarpelli's cross-examination of Culen was improper. The district court, however, held that the harmless error rule did not apply and that the trial court's failure to permit Scarpelli to cross-examine Culen concerning the reliability of Culen's identification testimony denied Scarpelli his sixth amendment right to confront the witnesses against him. The government filed a motion to alter or amend this judgment; the motion was denied.

I

The parties agree that the trial judge may limit the scope of cross-examination provided that the limitations do not prevent the defendant from effectively confronting the witnesses against him. *Chipman* v. *Mercer*, 628 F.2d 528, 531 (9th Cir. 1980). They disagree as to whether the trial court's restriction of Scarpelli's cross-examination of Culen was so extensive that it abridged Scarpelli's sixth amendment right to confront the witnesses against him. They also disagree as to what remedy is appropriate if, in fact, the trial court erred.

Constitutional error is not always harmful error. Only those errors which affect the defendant's substantial rights require reversal. Errors that have little, if any, effect on the defendant's conviction do not. *Chapman* v. *California*, 386 U.S. 18, 22 (1967). In determining whether a constitutional error is harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. Thus, we must decide whether restriction of the cross-examination of a crucial witness can ever, as a matter of law, be harmless beyond a reasonable doubt.

The district court held that any restriction on the cross-examination of a crucial witness is automatically harmful error in situations where (1) the witness' testimony is absolutely crucial to the defendant's conviction; and (2) the imposed restrictions rendered the defendant's cross-examination of that witness totally ineffective. *United States ex rel. Scarpelli* v. *George*, No. 81 C 864, slip op. at 7-8 (N.D. Ill. Oct. 30, 1981). Applying this harmful error per se rule to Scarpelli's case, the district court concluded that both factors were present because Culen was indisputably the prosecution's principal witness and Scarpelli's proffered questions relating to Culen's trial preparation and prior inconsistent statements were so relevant that failing to permit this line of inquiry effectively prevented any cross-examination relating to Culen's trustworthiness and reliability.

In adopting this per se error rule, the district court principally relied on *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Smith* v. *State of Illinois*, 390 U.S. 129 (1968); and *Chipman* v. *Mercer*, 628 F.2d 528 (9th Cir. 1980). Neither *Davis* nor *Smith* support an automatic reversal rule, and to the extent that *Chipman* does, we decline to adopt its rationale.

In *Davis* the petitioner challenged his state court conviction on the ground that the trial court violated his right to confront the witness against him by prohibiting him from questioning the prosecution's key witness about the witness' prior juvenile record and his probation status. The Supreme Court held that the petitioner had been denied a fair trial because the trial court's ruling prevented him from adequately exposing the jury to facts from which it might infer that the witness was unreliable. It further held that the restriction violated Davis' sixth amendment right of confrontation by preventing him from probing into any bias or prejudice which might have caused the witness to fabricate his identification testimony. The *Davis* Court, however, did not discuss the per se error rule or use language suggesting that this rule is the appropriate standard of review. *Davis* merely held that it is reversible error to restrict cross-examination when that restriction prevents the defendant from attempting to discredit the witness' accuracy and truthfulness. *Davis* v. *Alaska,* 415 U.S. 308, 317-18 (1974).

Similarly, the *Smith* Court did not adopt a per se error rule. In *Smith* the trial court refused to permit the petitioner to ask the principal prosecution witness his name or address. The Court held that this restriction was unconstitutional becuse the very starting point in probing a witness' credibility "must necessarily be to ask the witness who he is and where he lives" and that "to forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right to cross-examination itself." 390 U.S. at 131. This holding was based on the Court's conclusion that the defendant was prejudiced; the Court did not apply a per se error rule.

The Ninth Circuit in *Chipman* v. *Mercer*, 628 F.2d 528 (9th Cir. 1980), specifically stated that any infringement of a defendant's right of confrontation is harmful error per se. *Id.* at 533. Despite this explicit statement, the language of the decision suggests that the court was actually applying the *Chapman* harmless error doctrine, for it stated that "the denial of cross-examination for bias or prejudice *in this case* violated the confrontation clause." *Id.* (emphasis added). Moreover, the *Chipman* court relied on other Ninth Circuit decisions applying the harmless error beyond a reasonable doubt standard, which it did not overrule. This suggests that, while the decision speaks in terms of harmful error per se, the court, in fact, applied a less stringent standard.

We are mindful that cross-examination is the cornerstone of the criminal trial process, *United States* v. *Leach*, 613 F.2d 1295 (5th Cir. 1980), and that the defendant must be given wide latitude to explore a witness' story, to test the witness' perceptions and memory and to impeach his credibility. *United States* v. *Williams*, 592 F.2d 1277 (5th Cir. 1979). We also recognize that the right to cross-examine an adverse witness is not absolute and that the trial judge has considerable discretion to place restrictions on the scope of cross-examination once the right to confront witnesses has been substantially exercised. *United States* v. *West*, 670 F.2d 675 (7th Cir. 1982). *Accord*, *United States* v. *Miranda-Uriarte*, 649 F.2d 1345 (9th Cir. 1981); *United States* v. *Winley*, 638 F.2d 560 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 1472 (1982); *Greene* v. *Wainwright*, 634 F.2d 272 (5th Cir. 1981). Adoption of a per se rule would eliminate the trial judge's discretion, making it impossible to expedite the litigation or prevent the introduction of collateral issues which might distract the

jury. The per se error rule would give defense counsel unrestricted license during cross-examination to ask endless, repetitive or irrelevant questions which might confuse the jury as well as unproductively prolong the litigation. Ultimately the criminal process would be hindered. Accordingly, we decline to embrace the per se error rule even in the narrow context suggested by the district court.

II

The next consideration is whether Scarpelli was denied a fair trial because his questioning of Culen was restricted. Relying on *Sumner* v. *Mata*, 449 U.S. 539 (1981), Scarpelli contends that we must accept the state appellate court's finding that Scarpelli was denied his right of confrontation. Assuming *arguendo* that we may determine *de novo* whether his right was violated, Scarpelli argues that the record establishes that the trial court improperly restricted his cross-examination of Culen and that the court's error was not harmless error beyond a reasonable doubt. None of these arguments are persuasive.

Scarpelli's reliance on *Sumner* v. *Mata*, 449 U.S. 539 (1981), to support his argument that we must accept the state appellate court's finding that Scarpelli was denied the right to confront the witnesses against him is misplaced. In *Mata*, the issue was whether the federal habeas court could overrule a factual determination made by a state court. The Supreme Court held that while state factual findings were entitled to a "presumption of correctness," these findings could be overturned when they were not fairly supported by the record and the habeas court explicitly stated the reasoning by which it concluded that the state findings were erroneous. 449 U.S. at 550. The state court's finding that Scarpelli's sixth amendment

right was violated is a mixed question of law and fact, and, consequently, *Mata* does not preclude us from determining *de novo* whether Scarpelli was denied his constitutional rights.

The trial court sustained objections to Scarpelli's questions to Culen concerning (1) inconsistencies between Culen's trial testimony, and his initial police report, preliminary hearing testimony and suppression hearing testimony; (2) whether Culen used police reports or had conversations with the State's Attorney in preparation for his trial appearance; and (3) Culen's recollection of the height of the alleged offender whom he subsequently identified as Scarpelli.

Both the state appellate court and the district court agreed that the questions concerning the nature and credibility of Culen's identification of Scarpelli was a legitimate area for cross-examination. They also agreed that the trial court unduly restricted Scarpelli from attempting to impeach Culen's identification testimony by introducing Culen's prior inconsistent statements relating to the height of the alleged offender. Culen testified at trial that Scarpelli was 5'9". Defense counsel then attempted to introduce Culen's previous statement that the offender was between 5'6" and 5'10" tall. The state appellate court concluded that because the alleged inconsistent statements dealt wtih a slight discrepancy in Culen's testimony, the error in restricting questions on this subject "could not possibly be of such magnitude as to require reversal." *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 697, 402 N.E.2d 915, 922 (2d Dist. 1980), *cert. denied*, 450 U.S. 915 (1981). In contrast, the district court considered the restrictions concerning questions about Culen's identification testimony of Scarpelli in conjunction with the restrictions con-

cerning prior inconsistent statements and the extent to which Culen had prepared for his trial appearance. Applying the per se error rule, it concluded that "the totality of these rulings . . . effectively denied petitioner his constitutional right to confront an adverse winess." *United States ex rel. Gerald Scarpelli* v. *Richard George*, No. 81 C 864, slip op. at 3 (N.D. Ill. Sept. 30, 1981).

We agree with the state appellate court that the discrepancy between the two statements was slight. Moreover, there was other sufficient evidence supporting Scarpelli's conviction. The record establishes that Culen was the investigating officer surveilling a parking lot where several automobile thefts had occurred. The parking lot was well lit with vapor lights. Culen saw a car with two men drive into the lot and cruise up and down the lanes, passing several empty parking places. The car stopped a few spaces away from a 1975 Chevrolet Monte Carlo and one of the men emerged carrying a small black bag close to his body. He walked to the Monte Carlo, got inside, and started the car. As he began to back the Monte Carlo out of the space, Culen drove up behind the Monte Carlo, blocking its path, and got out of his car. When Culen was about fifteen feet from the Monte Carlo, he identified himself as a police officer and ordered the driver to freeze. Instead, the driver rushed out of the car and began to run away. Culen pursued him until he was apprehended. The man apprehended was Scarpelli. Culen also identified Scarpelli in court as the person who was in the Monte Carlo. Under these circumstances, where Scarpelli was apprehended at the scene of the crime rather than some time later on the basis of Culen's description, we agree with the state appellate court that "no reasonable doubt exists that the restriction of the defendant's cross-exami-

nation . . . [of Culen] . . . could have influenced the jury's determination of guilt." *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 697, 402 N.E.2d 915, 923 (2d Dist. 1980), *cert. denied*, 450 U.S. 915 (1981). Accordingly, any error in not permitting unlimited cross-examination of Culen was harmless beyond a reasonable doubt.

Scarpelli raises a myriad of other errors relating to Culen's cross-examination. Appellee's br. at 6. One of his chief complaints is that the trial court repeatedly refused to allow him to attempt to impeach Culen with other prior inconsistent statements. The state appellate court concluded that "with reference to the alleged prior inconsistent statements, the judge's rulings were correct, since either no inconsistency was shown or the question dealt with an immaterial matter." *Id.* at 696, 402 N.E.2d at 922. We agree. Scarpelli's other claims that the district court improperly restricted his cross-examination of Culen are eqaully unavailing.

We have carefully reviewed all of Scarpelli's arguments and conclude that the only error was the trial court's failure to permit Scarpelli to cross-examine Culen concerning his identification testimony. In light of the other evidence against Scarpelli, the error was harmless beyond a reasonable doubt. Accordingly, the district court order granting the writ of habeas corpus is

REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 20, 1982

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge

UNITED STATES OF AMERICA ex rel.
GERALD SCARPELLI,

Petitioner-Appellee,

No. 81-2806 vs.

RICHARD GEORGE,

Respondent, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 81 C 864

Susan Getzendanner, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Petitioner-Appellee Gerald Scarpelli, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Getzendanner

Cause No. 81C864 Date Oct. 30, 1981

Title of Cause—U.S. ex rel Gerald Scarpelli -v- Richard George

Brief Statement of Motion — Memorandum Opinion and Order

Enter Memorandum Opinion And Order: "Respondent's motion to alter or amend judgment and Findings of the Court is therefore denied. Petitioner's motion for bail is granted." (Draft)

/s/ Getzendanner, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. Gerald Scarpelli, Petitioner,	)	
v.	)	No. 81 C 864
RICHARD GEORGE, Respondent.	)	

MEMORANDUM OPINION AND ORDER

Susan Getzendanner
United States District Judge

On September 30, 1981, I issued a Memorandum Opinion and Order granting petitioner Gerald Scarpelli a writ of

habeas corpus. By later amendment I stayed this order and held that the writ would issue on October 30 if no retrial proceedings were commenced by that date. Now before the Court is the state's motion for reconsideration of the initial decision in favor of petitioner. For the reasons to follow, this motion is denied.

The September 30 opinion fully sets forth the background facts. In essence, I there held that the state trial judge had unconstitutionally limited petitioner's attempt to cross-examine arresting Officer Culen, the state's chief witness. I further held that errors of this sort are per se grounds for reversal and that the petition for habeas corpus was accordingly meritorious. As I read the state's motion for reconsideration, the initial half of this ruling is no longer in dispute. The state seems to have conceded that "[t]he totality of [the state trial judge's evidentiary] rulings . . . effectively denied petitioner his constitutional right to confront an adverse witness." *United States ex rel. Scarpelli* v. *George,* No. 81 C 864 (N.D. Ill. Sept. 30, 1981), slip op. at 3.* Rather, the state has concentrated its attack on my conclusion that the error in question constituted per se grounds for reversal. It argues that the "harmless error" rule of *Chapman* v. *California,* 386 U.S. 18 (1967), is the appropriate standard of review, and that, judged by this norm, the petition for habeas corpus must be denied.

In deciding this issue, it must be strictly borne in mind that the testimony offered by Officer Culen was absolutely

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* On direct appeal, the Illinois Appellate Court also found that the trial judge's actions were improper. *People* v. *Scarpelli,* 82 Ill. App. 3d 689, 696, 402 N.E.2d 915, 922 (2d Dist. 1980). The Court's determination, however, seems not to have ben based on the confrontation clause, but rather on various doctrines of state law.

"crucial" to the successful prosecution of petitioner.* For, fairly read, the case law establishes that whenever a criminal defendant is denied the right to cross-examine effectively the state's "chief" or "principal" witness, such error can never be deemed harmless. *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974); *Smith* v. *State of Illinois*, 390 U.S. 129, 131 (1968); *Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980).** For example, in *Davis*, the defendant was denied an opportunity to cross-examine fully the state's "crucial witness." *Davis* v. *Alaska*, *supra*, 415 U.S. at 310. Underscoring this latter point, the Supreme Court further noted that "[t]he accuracy and truthfulness of [the witness'] testimony were key elements in the State's case against petitioner." *Id.* at 317. The confrontation clause deprivation suffered by defendant, the Court thus held, was "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.* at 318. Similarly, in *Smith*, *per se* error was found to adhere in the trial judge's rulings which barred the defendant from questioning the state's "principal witness" about his real name and address. *Smith* v. *State of Illinois*, *supra*, 390 U.S. at 130-1

No case cited by the state establishes any contrary rule. In several of them, to be sure, confrontation clause errors were held to be harmless. But no such case concerned a defendant's right to cross-examine a witness who pro-

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* The Illinois Appellate Court recognized that Culen was "the State's chief witness" *People* v. *Scarpelli*, *supra*, 82 Ill. App. 3d at 690, 402 N.E.2d at 918.

** In one decision the Ninth Circuit has even extended the per se rule to a case in which the constitutional challenge concerned the defendant's right to confront a non-crucial witness. *United States* v. *Willis*, 647 F.2d 54, 58 (9th Cir. 1981).

vided testimony absolutely necessary for the conviction. In *Schneble* v. *Florida*, 405 U.S. 427 (1972), the trial judge admitted into evidence a hearsay statement made by the defendant's co-conspirator. The statement implicated the defendant and the co-conspirators were tried jointly. Therefore, the trial judge's ruling unconstitutionally denied the defendant his right to cross-examine the adverse deponent (the co-conspirator). *See Bruton* v. *United States*, 391 U.S. 123 (1968). In finding this error "harmless," Justice Rehnquist emphasized that the jury could have rationally voted to convict even if it had never learned of the co-conspirator's statements. The defendant's own confession had provided "independent evidence" of an "overwhelming" nature. *Schneble* v. *Florida*, *supra*, 405 U.S. at 431. Justice Rehnquist thus impliedly held that even if the defendant had been allowed to cross-examine the co-conspirator and even if this cross-examination had completely destroyed the latter's credibility, a conviction would still have been warranted.*

United States v. *Friedman*, 593 F.2d 109 (9th Cir. 1979) and *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978) are to like effect. In both cases the defendant had attempted to cross-examine a given witness; in both cases, these efforts had been frustrated by the trial judge's evidentiary rulings. And, most importantly, in both cases, the Ninth Circuit further found that the witness' testimony had been essentially cumulative and unnecessary. The remaining evidence of the defendant's guilt was

---

* The dissenters disputed Justice Rehnquist's evaluation of the strength of the state's "independent evidence." *Schneble* v. *Florida*, 405 U.S. 427, 432 (opinion of Marshall, J.). The fact remains, however, that the majority viewed the record in the manner described in the text.

deemed, as in *Schneble,* "overwhelming." *United States* v. *Friedman, supra,* 593 F.2d at 121; *United States* v. *Price,* 577 F.2d at 1362.

The D.C. Circuit's opinion in *United States* v. *Pugh,* 436 F.2d 222 (D.C. Cir. 1970) seems at first glance to be inconsistent with this analysis. There, the Court held that an improper restriction on the defendant's right to cross-examine "a key government [eye]witness" had been harmless. *Id.* at 223. Yet, despite this choice of adjective, it is clear that the testimony offered by this eyewitness had not been "crucial" in the sense used here. For a second eyewitness had provided essentially identical testimony implicating the defendant. *Id.* at 226. Thus, as in the previous cases, a conviction would still have been warranted even if the defendant's attempted cross-examination had completely neutralized the first witness' testimony.

The remaining cases cited by the respondent are distinguishable on an even more basic level. In none of them was there ever made an initial finding of confrontation clause violation. The question presented in *United States* v. *Kearney,* 420 F.2d 170 (D.C. Cir. 1969) and *United States* v. *Kizer,* 569 F.2d 504 (9th Cir. 1978), was whether the defendant had a right to cross-examine a state witness about that witness' alleged drug abuse. While conceding that these questions were pertinent and otherwise proper, the Appellate Courts further noted that such questions were fraught with dangers of prejudice. Accordingly, they upheld the restrictions imposed by the trial judge on the defendant's right to enter into this line of questioning. *See generally United States* v. *Knight,* 509 F.2d 354, 357 (D.C.Cir. 1974); *United States* v. *Fowler,* 465 F.2d 664 (D.C. Cir. 1972). The very most that can be gleaned from

these decisions is, therefore, a holding that, like other constitutional rights, a defendant's right to cross-examine an adverse witness is not absolute. It can be curtailed when the restriction is needed to effectuate other equally compelling social policies. *See generally Davis* v. *Alaska, supra.* These cases say very little, if anything, about what should be the appropriate remedy, once it is determined that the defendant's rights have indeed been abridged.*

Respondent lastly cited *United States* v. *Duhon*, 565 F.2d 345 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978). There, a defendant challenged his trial judge's restrictions on his attempt to question the state's key witness. The proposed inquiries concerned the witness' hearing ability and an alleged prior inconsistent statement. The Fifth Circuit rejected the latter claim, holding that the issue of the alleged inconsistency had been "fully aired before the jury." *Id.* at 354. As to the former claim, however, the Court of Appeals agreed that the trial judge had acted improperly. Most importantly, though, the Court did not hold that the defendant had thereby suffered a loss of a constitutional right. Apparently the Court viewed the defendant's proposed inquiry as too peripheral to be constitutionally guaranteed. *Accord, Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980) ("a confrontation clause violation generally does not occur unless the denied area of cross-examination is one of considerable relevance"). Thus, unlike the pres-

---

* In dictum, the *Kizer* court did say that even if an error had occurred, it had been harmless. Significantly, however, the court also added that "Nelson's testimony was largely cumulative and the Government introduced abundant independent evidence of Kizer's guilt." *United States* v. *Kizer*, 569 F.2d 504, 506 (9th Cir. 1978). Therefore, to the extent that *Kizer* is relevant at all to the question of remedy, it is completely consistent with *Davis, Smith, Schneble, Friedman, Price* and *Pugh*.

ent case, in *Duhon* there was never made an initial finding of constitutional violation.

In sum, the per se rule upon which I rely is narrow. It applies only if the defendant can establish two predicate factors, namely, (1) that the witness he attempted to cross-examine provided testimony absolutely "crucial" to his conviction, and (2) that the restriction imposed by the trial judge rendered "ineffective" whatever cross-examination was allowed. Thus, the per se rule will not apply if the witness' testimony was so unnecessary or cumulative that a conviction would have been warranted even if the defendant had succeeded in completely destroying the witness' credibility. Nor will it apply if the trial judge's rulings merely prevented the defendant from asking questions which were either repetitious or of marginal relevance.

In this case, the two predicate factors were undoubtedly present. Officer Culen was certainly a "crucial" witness within the meaning ascribed above. The state's case rested almost entirely on his claim that he had observed petitioner commit the challenged offense. Moreover, the petitioner's attempted inquiries—into Officer Culen's trial preparation and prior inconsistent statements—were highly relevant. In barring them, the trial judge thus prevented petitioner from "effectively" challenging his primary accuser. As I held before, "confrontation clause errors *of this sort* are . . . per se grounds for reversal . . . ." *United States ex rel. Scarpelli* v. *George*, *supra*, slip op. at 4 (emphasis added).

Such a result is, I believe, quite sensible. For whenever a criminal defendant is denied an ample opportunity to question the state's primary witness, the danger of prejudice is obviously great. In asking that I deem the trial

judge's errors "harmless," respondent is essentially arguing that these dangers are only presumptively large, and that the state should be allowed an opportunity to rebut this inference. Two factors counsel against such an approach. First of all, since the primary witness has, by definition, been excused from answering the defendant's questions, there is absolutely no way to know with certainty exactly how he would have responded. Therefore, in order to hold that errors of this sort were harmless beyond a reasonable doubt, a court would of necessity have to engage in an intolerable amount of initial speculation.* Moreover, even if it were somehow possible to divine how the witness would have responded, and even if it were somehow possible for a reviewing court to make an informed judgment as to credibility on the basis of the paper record it had created, such a procedure would not allot a criminal defendant his due. For if the Sixth Amendment's guarantee of trial by jury has any meaning, it would seem to accord each defendant the right to have *his peers* assess the credibility of his primary accuser on the basis of all relevant evidence. Trial by reviewing court is no substitute:

> We cannot speculate as to whether the jury as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.''

Davis v. *Alaska*, *supra*, 415 U.S. at 317 (citation omitted).

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* By contrast, when a witness is not "crucial" as defined above, a court can hold for the state even if it assumes *arguendo* that no rational juror could have credited the witness' testimony.

Respondent's Motion to Alter or Amend Judgment and Findings of the Court is therefore denied. Petitioner's Motion for Bail is granted.

/s/ *Susan Getzendanner*
Susan Getzendanner
United States District Judge

Dated: October 30, 1981

APPENDIX D

Name of Presiding Judge. Honorable Getzendanner
Cause No. 81 C 864 Date Sept. 30, 1981

Title of Cause—U.S. ex rel Scarpelli v. George

Brief Statement of Motion — Memorandum Opinion and Order

ENTER MEMORANDUM OPINION AND ORDER: "Accordingly, the court orders that the petitioner's petition for writ of habeas corpus be granted and that he be released." (DRAFT)

/s/ Getzendanner, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States ex rel. Gerald Scarpelli, Petitioner,	)	
v.	)	No. 81 C 864
Richard George, Respondent.	)	

Memorandum Opinion
and Order

This habeas corpus action is before the court on petitioner's motion for summary judgment. Petitioner argues that his prior state conviction must be set aside on the ground that the state trial judge improperly limited peti-

tioner's attempt to cross examine the state's chief witness.* I agree.

The pertinent facts are relatively simple. On February 8, 1977, petitioner was arrested for auto theft and possession of burglary tools. Trial was held in July of 1979. The state's primary witness was Clyde E. Culen, a police officer who claimed to have witnessed petitioner commit the above crimes. Petitioner's counsel attempted to test Culen's credibility, but numerous inquiries were thwarted when the state court trial judge sustained evidentiary objections. The jury subsequently returned guilty verdicts on both counts. The defendant was sentenced. On appeal, the Illinois Appellate Court sustained the convictions. *People* v. *Scarpelli*, 82 Ill. App. 3d 689, 402 N.E.2d 915 (2d. Dist. 1980). Petitioner's Petition for Leave to Appeal was denied by the Illinois Supreme Court and the United States Supreme Court refused to grant a writ of certiorari.

The Illinois Appellate Court agreed with petitioner's claim that his right to cross examine Officer Culen had been abridged. Specifically the Court found error in the trial court's rulings which denied petitioner the opportunity to explore an apparent inconsistency between Culen's trial and preliminary hearing testimony. At the preliminary hearing Culen had testified that the height of the suspect he had viewed committing the alleged theft was between 5'6" and 5'10". Two years later at the trial Culen testified that the thief was "definitely" no more

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* A defendant's right to cross examine prosecution witnesses derives from the Sixth Amendment's Confrontation Clause. *Pointer* v. *Texas*, 380 U.S. 400, 401 (1965). This right has been incorporated into the guarantees of the Fourteenth Amendment's Due Process Clause. *Id.* at 403.

than 5'9". Trial Transcript at 200. The trial court had previously ruled that the noted discrepancy was so inconsequential that it was a completely improper basis for impeachment.

Like the Illinois Appellate Court, I cannot agree with the state trial court judge. The subject matter of the petitioner's inquiry was not so tangential that it was excludable under the "collateral matters" doctrine. The Illinois Appellate Court's determination of error, in this court's opinion, was correct.

Moreover, the discrepancy noted by the Appellate Court was not unique. On numerous additional occasions the trial judge similarly barred exploration of inconsistencies between Officer Culen's trial testimony and his initial police report, preliminary hearing testimony, and suppression hearing testimony. See generally pages 214, 225, 234, 193-95, 204, 213, 216, 210, 212 and 124-25 of the Trial Transcript. Barred as well were inquiries into the extent to which Officer Culen had prepared for his trial appearance. The totality of these rulings, I believe, effectively denied petitioner his constitutional right to confront an adverse witness. Much less egregious deprivations have already been held to be unconstitutional. See *Smith* v. *State of Illinois,* 390 U.S. 129 (1968).

The Appellate Court nevertheless affirmed petitioner's conviction on the ground that the trial court's errors had been "harmless." *People* v. *Scarpelli, supra,* 402 N.E.2d at 922. This analysis is at variance with the Supreme Court's repeated admonition that:

> If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.

Brookhart v. *Janis*, 384 U.S. 1, 3 (1966); *accord*, *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974); *Smith* v. *State of Illinois*, *supra*, 390 U.S. at 131. Confrontation Clause errors of this sort are thus per se grounds for reversal and petitioner is entitled to a writ of habeas corpus.

Accordingly, the court orders that the petitioner's petition for writ of habeas corpus be granted and that he be released.

/s/ *Susan Getzendanner*
Susan Getzendanner
United States District Court Judge

September 30, 1981.

Supreme Court, U.S.
FILED
DEC 29 1982
ALEXANDER L. STEVAS
CLERK

No. 82-856

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA ex rel. GERALD SCARPELLI,

Petitioner,

v.

ROBERT A. FISCELLA ~~RICHARD GEORGE,~~

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 31406—50—12-27-82)

QUESTION PRESENTED FOR REVIEW

Whether the petitioner has presented a question worthy of review by this Court where there is no conflict among the circuits, no conflict between this Court and the Seventh Circuit, and the claim has already been rejected as not worthy of review in a previous application for certiorari by this petitioner.

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In The

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA
ex rel. GERALD SCARPELLI,

Petitioner,

v.

RICHARD GEORGE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit insofar as the petitioner's issue does not raise a question of constitutional proportion worthy of review by this Court.

JURISDICTION

For the reasons set forth in the argument following, the petitioner has failed to demonstrate any reason for this Court to exercise its judicial discretion and grant the petition for writ of certiorari.

STATEMENT OF THE CASE

The petitioner's statement of the case adequately sets forth the procedural history of this case. The respondent relies on the facts as contained in the Seventh Circuit's opinion filed with this Court as Appendix A to the petitioner's petition.

REASON FOR DENYING THE WRIT OF CERTIORARI

THERE IS NO QUESTION WORTHY OF REVIEW PRESENTED WHERE:

A. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS.

The petitioner suggests that an inter-circuit conflict exists because the rule of the Seventh Circuit is that the harmless error doctrine applies to confrontation clause violations whereas the rule of the Ninth Circuit is that the harmless error doctrine does not apply.

But there is no such conflict among the Circuit Courts. The general rule throughout is that the harmless error doctrine applies where there has been a restriction of cross-examination. *United States v. Keane*, 522 F.2d 534, 559 (7th Cir. 1975); *United States v. Pugh*, 436 F.2d 222 (D.C. Cir. 1971); *United States v. Kearney*, 420 F.2d 1970 (D.C. Cir. 1969); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978); *United States v. Friedman*, 593 F.2d 109 (9th Cir. 1979); *United States v. Kizer*, 569 F.2d 504 (9th Cir. 1979); *United States v. Duhon*, 565 F.2d 345 (5th Cir. 1978). Indeed, this Court has itself applied the doctrine to the confrontation clause. *Schneble v. Florida*, 405 U.S. 427 (1972).

The Ninth Circuit has applied the general rule in *Price*, *Friedman*, and *Kizer*. But for some reason it appeared to digress from the rule in *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980). This, at most, establishes only an *intra*-circuit conflict.

But upon review of these Ninth Circuit cases, the Seventh Circuit did not see even an intra-circuit conflict. In its opinion below, it noted that since *Chipman*

relied on the above-cited Ninth Circuit cases and did not overrule them, it actually applied a harmless error standard.

Accordingly, the Seventh Circuit is in accord with the decisions of the Ninth Circuit and of the other Circuit Courts of Appeals as well. Therefore, the petition should be denied.

B. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT AND THIS COURT.

The petitioner argues that the Seventh Circuit misconstrued this Court's ruling in *Sumner v. Mata*, 449 U.S. 539 (1981), when it determined that the question of whether the petitioner's sixth amendment right was violated was a mixed question of law and fact that could be decided *de novo*.

However, in its second *Sumner* opinion, this Court acknowledged that the ultimate question of constitutionality is a mixed question of law and fact that is not governed by § 2254 and that the only facts that underlie this determination are entitled to deference. *Sumner v. Mata*, ... U.S. ....., 102 S.Ct. 1303, 1306 (1982). This is exactly the rule followed by the Seventh Circuit. It looked at the underlying facts and made a determination as to whether the constitution was violated. And on the basis of those facts, it agreed with the state court *in toto*. Like the state court, it disagreed with most of petitioner's claims of error. And like the state court, it determined that the only error came when the trial court restricted cross-examination regarding the height of the petitioner, and that this error was harmless.

Since the Seventh Circuit was in complete agreement with the state court, the petitioner can certainly not show prejudice by claiming that the federal habeas court did

not properly defer to the findings of the state court. Therefore, the petition should be denied.

C. THIS COURT HAS ALREADY REJECTED THE CLAIM AS NOT WORTHY OF REVIEW.

The petitioner claims that this issue is of significance and importance. However, this Court has already rejected this claim. When the petitioner sought review after direct appeal, this Court denied it on February 23, 1981. *Scarpelli v. People of the State of Illinois*, 450 U.S. 915 (1981).

Now the petitioner seeks review of the same claim after an unsuccessful venture in federal habeas corpus relief. His claim is still not worthy of review by this Court and the petition should be denied.

CONCLUSION

For the foregoing reasons, the respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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